has no standing in England,[5] though it has been suggested as desirable legislation.[6] In the United States[7] it naturally occurs in the Louisiana code;[8] other jurisdictions have recognized it only as part of the French[9] or Spanish[10] law. The liberal statutory regulations on this subject in almost every state, however, probably reach the same practical results.[7]

On the second point of the principal case, the broad holding that a mistake as to the legal effect of a previous divorce would not satisfy the requirements of the doctrine of putative marriage, the court seems twice misled. Tribunals administering the Napoleonic code have considered an honest misapprehension of the parent's own law sufficient to legitimize the offspring.[11] But if it be conceded that the parent's mistake must have been one of fact,[12] then the present decision, based on Lord Colonsay's suggestion[13] that foreign law is fact only for purposes of evidence, may still be doubted; for in respect to a matter of substantive law, a mistake as to foreign law has been held to be a mistake of fact;[13] and for the very purposes of applying the rule of putative marriage under the French code, a mistake by a foreign woman as to the validity of the divorce obtained by the other parent, a Frenchman, was treated as a mistake of fact.[14] This particular result was correct, since the French law determines the validity of a marriage by the law of the parties' nationality;[15] hence the foreign mother's belief as to the Frenchman's capacity was a belief as to French law, law foreign to her. But in the principal case, if the father's domicile is assumed to have been Scottish, the question of legitimacy depended upon Scottish law;[16] under Scottish law the *lex loci* governs the marriage contract;[17] therefore the parents misconstrued, if any, the law of California, and were entitled to the benefit of a mistake of fact. Such a line of reasoning apparently escaped both court and counsel in the case.

CONSIDERATION MOVING TO THE PROMISOR FROM ONE OTHER THAN THE PROMISEE. — It has long been deemed the established doctrine of the common law of England that "a stranger to the consideration can maintain no action on a contract."[1] On examination, however, the cases cited for the proposition seem to establish not so much that the plaintiff must be the source of the consideration as that he must not be a stranger to the promise.[2]

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[5] See 2 Roper, Husband and Wife, 2 ed., 465.

[6] See Geary, Marriage, xi.

[7] The so-called Enoch Arden statutes provide only for the mistaken belief as to the death of a former spouse. *Cf.* N. Y. Civ. Co. Pro., § 1745. One statute, however, provides also for a mistake as to the legality of a previous divorce. Comp. Laws of Utah, § 1185.

[8] §§ 117, 118.

[9] See *Re* Hall, 61 N. Y. App. Div. 266.

[10] Smith *v.* Smith, 1 Tex. 621.

[11] Succession of Benton, 106 La. 494. See 15 HARV. L. REV., 393; Fraser, Parent and Child, *supra*.

[12] See Fernex *v.* Floccard, Jour. du Palais, 1870, 895 n. (5), where the reporter seems to think the point an open one.

[13] Haven *v.* Foster, 9 Pick. (Mass.) 112.

[14] Fernex *v.* Floccard, *supra*.

[15] 1 Toullier, § 576.

[16] Shedden *v.* Patrick, 5 Paton App. 194.

[17] See 2 Fraser, Husband and Wife, 2 ed., 1297 *et seq.*

[1] Crow *v.* Rogers, 1 Str. 592.

[2] Am. Lead Cas. 176.

The cases are of two classes. (1) Often the plaintiff is the recipient of the promise as the agent of a disclosed principal who alone is entitled to maintain the action under the peculiar doctrines of the law of agency.[3] (2) More often C is attempting to sue on a promise made by B to A, either for the exclusive benefit of C,[4] or for the purpose of removing some liability of A to C.[5] Such a plaintiff is not only a stranger to the consideration, but he is also a stranger to the promise, and it is submitted that this is the real objection to allowing him an action.[6] Indeed, in one of the early English cases of this sort we find Patterson, J., willing to arrest judgment because "there is no promise to the plaintiff alleged."[7] American courts have generally refused to follow the rigidity of the English common law, usually allowing the so-called beneficiary to maintain an action, even though not the promisee.[8]

These cases are to be contrasted with those of which a recent New York case is an example. The defendant, at the request of his father and in consideration of advances from the latter, promised the plaintiff to pay her an annuity. An action was allowed. *Hamilton* v. *Hamilton*, 112 N. Y. Supp. 10 (App. Div.). Here there was no consideration moving from the plaintiff and the English courts would probably have denied a right of action. Yet the case is clearly distinguishable from those of which *Lawrence* v. *Fox* is the familiar example; for here the plaintiff was the promisee.

It is laid down in the books that at common law "a binding promise vests in the promisee and in him alone."[9] Frequently it is said that the promise and the consideration must unite in the plaintiff and that the consideration will draw to it the promise;[10] but it is difficult to see how this can be when there is an express promise to a third person who is not a mere agent of a disclosed principal. In Massachusetts, where the erroneous doctrine of *Lawrence* v. *Fox* is not followed, a promisee from whom the consideration did not move has been allowed to sue in at least two cases.[11] Indeed, the leading Massachusetts case,[12] after laying down the rule that a stranger to the consideration may not sue the promisor, adds, "unless the latter has also made an express promise to the plaintiff." While it must be conceded that the historical development of the action of assumpsit out of the action of tort for deceit[13] seems to necessitate a detriment to the plaintiff in order to support an action, it is difficult to see any practical objection to allowing C to sue on a promise made to him by B at the request of A, the latter having incurred legal detriment at the request of the promisor. Such has been the holding of American courts with reference to

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[3] Gray *v.* Pearson, L. R. 5 C. P. 568.
[4] Tweddle *v.* Atkinson, 1 B. & S. 393.
[5] Bourne *v.* Mason, 1 Vent. 6.
[6] See Comstock, J., dissenting in Lawrence *v.* Fox, 20 N. Y. 268, 275. And see 15 HARV. L. REV. 767, 771.
[7] Price *v.* Easton, 4 B. & Ad. 433.
[8] See cases collected in Wald's Pollock, Contracts, 3 ed., 249, 256, 260.
[9] Langdell, Summary of the Law of Contracts, § 62; Esling *v.* Zantzinger, 13 Pa. St. 50, 55.
[10] Tracy *v.* Gunn, 29 Kan. 508; Edmundson *v.* Penny, 1 Barr (Pa.) 334.
[11] Eaton *v.* Libbey, 165 Mass. 218; Cabot *v.* Haskins, 3 Pick. (Mass.) 83. See also Palmer Savings Bank *v.* Ins. Co., 166 Mass. 189, 195; Marston *v.* Bigelow, 150 Mass. 45, 53.
[12] Exchange Bank *v.* Rice, 107 Mass. 37, 43.
[13] See 2 HARV. L. REV. 1–19, 53–60.

promissory notes,[14] the modern conception of which rebuts any objection to the relevancy of these cases here based on the assumption that promissory notes are specialties requiring no consideration. The same result has been reached by a number of jurisdictions in cases of simple contract,[15] and at least one state has a statutory declaration to that effect.[16]

RECENT CASES.

ADMIRALTY — DECREES — CHANGE IN TITLE IN CONDEMNED PRIZE. — The plaintiff sued on a policy of marine insurance for loss of his ship by perils of the sea. The ship was captured during the Russo-Japanese war by a Japanese cruiser, but was wrecked on the Japanese coast before reaching port. Subsequently the wreck was condemned as a prize. *Held*, that the insured cannot recover. *Andersen* v. *Marten*, [1908] A. C. 334.

For a discussion of the case in the lower court, see 21 HARV. L. REV. 55.

BANKRUPTCY — DISCHARGE — EFFECT OF COMPOSITION AGREEMENT IN EXERCISING STATUTORY CONDITION. — By statute the stockholders of a corporation were made personally liable for its debts after judgment against the corporation and petition of execution unsatisfied. A corporation filed a petition in bankruptcy and all suits against it were restrained. The plaintiff secured an order permitting him to bring action, but before judgment a composition agreement was accepted by a majority of the creditors against the plaintiff's rights and was ratified by the court. The plaintiff thereupon discontinued his suit. He then sued the stockholders on their statutory liability. *Held*, that he cannot recover. *Firestone Fire Co.* v. *Agnew*, 40 N. Y. L. J. 639 (N. Y. App. Div., Nov. 1908).

The confirmation of a composition agreement by the proper court has the same effect as a discharge in bankruptcy. *In re Merriman*, Fed. Cas. 9, 479. The purpose of requiring a judgment here as a condition precedent is to make the creditor prove the debt and exhaust his remedy against the corporation. *United Glass Co.* v. *Vary*, 152 N. Y. 121. When performance of such a condition is rendered impossible by operation of law, it is excused. *Flash* v. *Conn.*, 109 U. S. 371. But it has been held that the court, in order to enable the plaintiff to go against the sureties on an attachment bond, may render judgment with a perpetual stay of execution, against a discharged bankrupt. *Hill* v. *Harding*, 130 U. S. 699. *Contra*, *Johnson* v. *Collins*, 117 Mass. 343. This analogous case then is authority for saying that though the corporation is relieved from paying the debt, a special judgment may be had against it for certain purposes. The right to this anomalous action against the bankrupt makes the present decision logical. But as a matter of practical expediency, it seems doubtful whether the court should compel the plaintiff to pursue this fruitless action before he can reach the stockholders.

BANKS AND BANKING — BANKER'S LIEN — EFFECT OF VOID PAYMENT OF NOTES. — An insolvent corporation deposited funds in the defendant bank which held its notes, some unmatured. By checks drawn on its deposit within four months of its bankruptcy, the corporation paid the notes as they matured. The checks were given intending a preference, and were therefore voidable

[14] Eaton *v.* Libbey, *supra;* Mize *v.* Barnes, 78 Ky. 506; Horn *v.* Fuller, 6 N. H. 511.

[15] Rector of St. Marks *v.* Tweed, 120 N. Y. 583; Bank *v.* Chalmers, 144 N. Y. 432; Williamson *v.* Yager, 91 Ky. 282; Cabot *v.* Haskins, *supra;* Van Eman *v.* Stanchfield, 10 Minn. 255.

[16] Ga. Civ. Code, § 3664. In Bell *v.* Sappington, 111 Ga. 391, specific performance was granted of such an agreement.